Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

LUDENCE ALFORD TURNBULL, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. May a judicial determination, by a preponderance of the evidence, of the quantity of controlled substances attributable to a defendant, be the basis for calculating a defendant's total offense level, when that calculation would mandate the sentencing court, pursuant to U.S. Sentencing Guidelines Manual § 5G1.2(d) (2001), to impose consecutive and not concurrent sentences, as otherwise mandated by U.S. Sentencing Guidelines Manual § 3D1.2(b) (2001), thereby exposing a defendant to a sentence beyond the statutory maximum, when an Apprendi error has occurred.

LIST OF ALL PARTIES

Petitioner/Appellant/Defendant

- Ludence Alford Turnbull, Jr.
- Douglas C. McNabb
  Attorney for Petitioner
- Stanley E. Sacks
  Attorney for Appellant/Defendant

Respondent/Appellee/Plaintiff

- United States of America
- Laura Pellatiro Tayman
  Assistant United States Attorney
  Attorney for Appellee/Plaintiff
- Seth P.Waxman
  Solicitor General
- James K. Robinson
  Assistant Attorney General
- Nina Goodman
  Attorney

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Petitioner, Ludence Alford Turnbull Jr., respectfully prays that a Writ of Certiorari issue to review and reverse the Judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Opinion and Decision of the United States Court of Appeals for the Fourth Circuit is enclosed and printed as Appendix A.

JURISDICTION

The trial court's judgment was entered on July 7, 1998. The Fourth Circuit rendered its opinion on May 2, 2000. Petitioner filed his Writ of Certiorari on August 30, 2000. This Court granted certiorari on December 4, 2000, and vacated and remanded Petitioner's case on January 8, 2001, in further consideration in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). The Fourth Circuit Court of Appeals reopened Petitioner's case on January 8, 2001. In an unpublished opinion filed December 18, 2001, the Fourth Circuit Court of Appeals affirmed its prior decision. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

- Fifth and Sixth Amendments, Constitution of the United States (Appendix B)
- Statutes pertaining to convicted offenses (Appendix C)
- Statutes pertaining to Sentencing Guidelines (Appendix D)
- Statutes pertaining to jurisdiction (Appendix E)

STATEMENT OF THE CASE

Petitioner, Ludence Alford Turnbull Jr., was named in a 25-count indictment along with 12 co-defendants and charged with conspiracy to import and distribute cocaine and cocaine base, conspiracy to launder money, as well as importation and attempted importation of cocaine and six counts of money laundering. Only Petitioner and co-defendant Keithroy Clarke exercised their right to trial.

In her instructions to the jury, the trial judge stated:

> Counts 1, 2, 23, 24, 25 of the indictment allege that an approximate amount of a controlled substance was involved in the crime charged. **It is not necessary for the government to prove the exact or precise amount of controlled substances alleged in the indictment.** (Emphasis ours)(Transcript of Jury Instructions, page 43).

The Jury convicted Petitioner of all conspiracy counts, as well as the charges of importation of cocaine and money laundering.

At Petitioner's sentencing hearing, the trial judge made finding of fact, by a preponderance of the evidence, as to the quantity of controlled substances attributable to Petitioner, pursuant to U.S. Sentencing Guidelines § 2D1.1, and that Petitioner was a "manager

or supervisor of a criminal activity which involved five or more participants and was otherwise extensive, in that he exercised management responsibility over the property, assets and transactions...", pursuant to U.S. Sentencing Guidelines § 3B1.1(b). (Transcript of Sentencing Hearing, pages 83-84).

By these findings, Petitioner's total offense level, with a criminal history of IV, was calculated to be 40 (base offense level of 36 plus 4 for role in the offense), with a sentencing range of 360 months - life. U.S. Sentencing Guidelines Ch. 5 Pt. A - Sentencing Table.

Petitioner was sentenced to 400 months imprisonment for each conspiracy count, with 10 years supervised release. As mandated by U.S. Sentencing Guidelines Manual § 3D1.2(b) (2001), all counts were grouped, to run concurrent, as they involved the same victim and two or more acts or transactions connected by a common criminal objection or constituting part of a common scheme or plan.

Petitioner appealed his convictions and sentences to the Fourth Circuit Court of Appeals, which affirmed the lower courts decision. United States v. Turnbull, No. 98-4532, WL 524800 (4th Cir. May 2, 2000)(unpublished), vacated, 531 U.S. 1033 (2001).

Petitioner filed his Writ of Certiorari on August 30, 2000. This Court granted certiorari on December 4, 2000, and vacated and remanded Petitioner's case on January 8, 2001, in further consideration in light of Apprendi.

Upon remand, the Fourth Circuit Court of Appeals affirmed its prior holding, stating:

> [I]n the case of multiple counts of conviction, the guidelines instruct that if the total punishment mandated by the guidelines exceeds the highest statutory maximum, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment.
>
> [T]he district court was obligated to impose consecutive sentences on Turnbull's various convictions until it reached to total punishment of one-hundred years.
>
> We therefore find no plain error under Apprendi.

REASONS FOR GRANTING THIS WRIT

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court confirmed it opinion in Jones v. United States, 526 U.S. 227 (1999), stating:

> Other than the fact of a prior conviction, any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that [Jones] case: 'It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'

The judicial finding, by a preponderance of the evidence, as to of the quantity of controlled substances attributable to Petitioner, mandated the sentencing court, pursuant to U.S. Sentencing Guidelines Manual § 5G1.2(d) (2001), to impose consecutive and not concurrent sentences, as otherwise mandated by U.S. Sentencing Guidelines Manual § 3D1.2(b) (2001). Absent this mandate, and in light of the Apprendi error, the trial court would have been precluded from assessing a penalty above the default statutory maximum of twenty years, pursuant to § 841(b)(1)(C). See United States v. Angle, 230 F.3d 113 (4th Cir. 2000).

To date, Petitioner is unable to find a single appellate decision on all fours with the facts of his case. It has been recognized, however, "that sections 841(b)(1)(A) and 841(b)(1)(B), the enhanced statutory maximum penalty provisions of § 841, 'may not be utilized for sentencing without a finding of drug quantity by the jury.'" United States v. Westmoreland, 240 F.3d 618, 632 (7th Cir. 2000), See also, United States v. Baltas, 236 F.3d 27, 39 (1st Cir. 2001); United States v. Thomas, 274 F.3d 655, 660 (2d Cir. 2001); United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001), en banc; United States v. Angle, 230 F.3d 113 (4th Cir. 2000); United States v. Doggett, 230 F.3d 160 (5th Cir. 2000); United States v. Rebmann, 226 F.3d 521, 524 (6th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 931 (8th Cir. 2000); United States v. Nordby, 225 F.3d 1053, 1056 (9th Cir. 2000); United States v. Hishaw, 235 F.3d 565, 575(10th Cir. 2000); United States v. Rogers, 228 F.3d 1318, 1326-28 (11th Cir. 2000); United States v. Fields, 251 F.3d 1041, 1043 (D.C. Cir. 2001).

CONCLUSION AND PRAYER

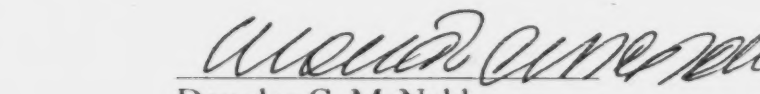
This case addresses the issue raised in Apprendi, e.g. the necessity for a jury finding as to quantity of controlled substances attributable to a defendant, with judicial enhancement provisions of the Federal Sentencing Guidelines. As stated in Apprendi v. New Jersey, supra, at 490, "[o]ther than the fact of a prior conviction, any fact that increases the penalty beyond

the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

Petitioner contends the judicial finding, by a preponderance of the evidence, as to of the quantity of controlled substances attributable to Petitioner, was the triggering mechanism, mandating a sentence above the **prescribed statutory maximum**, as otherwise limited by the Apprendi error, **of twenty years**.

For these reasons, Petitioner LUDENCE ALFORD TURNBULL, JR., respectfully prays that this Court grant the petition, and issue a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Fourth Circuit, and for such other and further relief to which he may be entitled.

Respectfully submitted,



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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v. No. 98-4532

Ludence Alford Turnbull, JR.,
Defendant-Appellant.

On Remand from the United States Supreme Court
(S. Ct. No. 00-345)

Submitted: November 30, 2001

Decided: December 18, 2001

Before WILKINSON, Chief Judge, and WILLIAMS and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Stanley E. Sacks, SACKS & SACKS, Norfolk, Virginia; Douglas C. McNabb, Houston, Texas, for Appellant. Kenneth E. Melson, United States Attorney, Laura Pellatiro Tayman, Assistant United States Attorney, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

This case is on remand from the United States Supreme Court for further consideration in light of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that "[o]ther than a fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). The Court decided *Apprendi* after a jury convicted Ludence Turnbull of conspiracy to import cocaine and cocaine base, in violation of 21 U.S.C. § 963(b) (1994); conspiracy to distribute and possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a), 846 (1994); conspiracy to launder money, in violation of 18 U.S.C. § 1956(h) (1994); money laundering (six counts), in violation of 18 U.S.C. § 1956(a)(1)(A) (1994); and importation of cocaine, in violation of 21 U.S.C. §§ 952, 960 (1994). The district court sentenced Turnbull to concurrent 400-month sentences on each of the drug conspiracy counts, concurrent 240-month sentences on each of the money laundering counts, and 360 months on the importation count, and we affirmed his convictions and sentences. *United States v. Turnbull*, No. 98-4532, 2000 WL 524800 (4th Cir. May 2, 2000)(unpublished), *vacated*, 531 U.S. 1033 (2001). After reviewing his convictions and sentences for plain error in light of *Apprendi*, we affirm.[1] *See United States v. Promise*, 255 F.3d 150, 154 (4th Cir. 2001)(en banc)(discussing plain error standard of review), *petition for cert. filed*, Sept. 20, 2001 (No. 01-6398).

---

[1] Because *Apprendi* does not affect the reasoning in our prior opinion in this case, we adhere to that decision.

In *Promise*, we applied *Apprendi* to drug offenses in §§ 841 and 846 and held that "the specific threshold [drug] quantity must be treated as an element of an aggravated drug trafficking offense, *i.e.*, charged in the indictment and proved to the jury beyond a reasonable doubt." *Id.* at 156-57 (footnotes omitted). However, in the case of multiple counts of conviction, the guidelines instruct that if the total punishment mandated by the guidelines exceeds the highest statutory maximum, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment. *See U.S. Sentencing Guidelines Manual* § 5G1.2(d) (2000). Therefore, the district court was obligated to impose consecutive sentences on Turnbull's various convictions until it reached the total punishment of one hundred years. *United States v. White*, 238 F.3d 537, 542-43 (4th Cir.), *cert. denied*, ___ U.S. ___, 121 S. Ct. 2235 (2001)(holding that if the result of *White* "stacking" yields the functional equivalent of a life sentence, defendant cannot demonstrate plain error). Consequently, Turnbull cannot show that his 400-month sentence was "longer than that to which he would otherwise be subject." *White*, 238 F.3d at 542. We therefore find no plain error under *Apprendi*. Nor do we find plain error in the district court's application of the enhancement for being a leader or organizer, USSG § 3B1.1(a) (2000), which Turnbull alleges violates *Apprendi*. *United States v. Kinter*, 235 F.3d 192, 200-01 (4th Cir. 2000)(holding that *Apprendi* does not apply to judge's exercise of sentencing discretion within statutory range, so long as defendant's sentence is not set beyond maximum term specified in substantive statute), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1393 (2001).

Accordingly, we affirm Turnbull's convictions and sentences.[2] We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

[2] We deny Turnbull's motion to hold his appeal in abeyance pending a decision on the petition for a writ of certiorari in *United States v. Promise*.

APPENDIX B

Amendments to the Constitution of the United States

Article [V .]

No person shall be held to answer for a capital crime, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX C

Convicted Offenses

18 U.S.C. § 1956
Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts such a financial transaction which in fact involves the proceeds of specified unlawful activity --

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 USCS § 7201 OR 7206]; or

(B) knowing that the transaction is designed in whole or in part --

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

* * * *

21 U.S.C. § 841
Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 U.S.C.S. § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentence as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

* * * *

21 U.S.C. § 952
Importation of controlled substances

(a) Controlled substances in schedule I or II and narcotic drugs in schedule II, IV, or V; exceptions. It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, except that -- ...

* * * *

21 U.S.C. § 960
Prohibited acts A

(a) Unlawful acts. Any person who --
(1) contrary to section 1002, 1003, or 1007 [21 U.S.C.S. § 952, 953, or 957], knowingly or intentionally imports or exports a controlled substance, . . .
(2) In the case of a violation of subsection (a) of this section involving --

(A) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(B) 500 grams or more of a mixture or substance containing a detectable amount of --

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts of isomers;

* * * *

21 U.S.C. § 963
Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

* * * *

APPENDIX D

Sentencing Guidelines - Pertinent Sections

U.S.S.G. § 2D1.1
Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(c) Drug Quantity Table

Controlled substances and quantity*

Base offense levels

(2) Level 36

At least 10 KG but less than 30KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);

At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants.

At least 500 G but less than 1.5 KG of Cocaine Base; . . .

* * * *

U.S.S.G. § 3B1.1
Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

* * * *

U.S.S.G. § 3D1.2(b)
Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group.

Counts involve substantially the same harm within the meaning of this rule:

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

Offenses covered by the following guidelines are to be grouped under this subsection:

. . . § 2D1.1 . . .

* * * *

U.S.S.G. § 5G1.2(d)
Sentencing on Multiple Counts of Conviction

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

* * * *

U.S.S.G Chapter 5, Part A -

SENTENCING TABLE
(in months of imprisonment)

Criminal History Category (Criminal History Points)						
offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13+)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	0-6
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	2-8	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	41-51	51-63	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	42-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262

33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	Life	Life	Life	Life	Life	Life

Zone A - Zone B - ■ Zone C - ■ Zone D - ❒

APPENDIX E

Jurisdiction

28 U.S.C. § 1254
Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

* * * *